IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23/10/2003

CORAM

THE HONOURABLE MR.JUSTICE P.K.MISRA
AND
THE HONOURABLE MR.JUSTICE F.M.IBRAHIM KALIFULLA

WRIT PETITION NO.11228 OF 2003
AND W.P.NOS. 11666 to 11668, 18903,
18905 to 18907 OF 2003
AND
W.P.M.P.NOS.14078, 14679 to 14681, 23661 and
23663 to 23665 OF 2003

W.P.NO.11228 OF 2003:

The Madras High Court Staff Association,
represented by its Secretary,
Mr.W.Solomon,
Chennai-104. .. Petitioner

-Vs-

1.Government of Tamil Nadu,
rep. by the Chief Secretary to
Government, Secretariat,
Chennai-600 009.

2.The Secretary to Government,
Personnel & Administrative Reforms Department,
Chennai-600 009.

3.The Registrar General,
High Court of Madras,
Chennai-600 104. .. Respondents

For Petitioners :: Mr.K.Chandru, SC
for Mr.S.Namasivayam
Mr.S.Nandakumar

For Respondents :: Mr.R.Muthukumarasamy, AAG
assisted by
Mr.S.T.S.Murthy, Spl.G.P.

Prayer: These Writ Petitions are filed under Article 226 of

the Constitution, praying for issuance of Writ of Declaration, for the reliefs as stated therein.

:COMMON ORDER

F.M.IBRAHIM KALIFULLA, J.
The challenge in these Writ Petitions is to the Government Orders in G.O.Nos.71, 72, 73 and 74 dated 19-3-2003, G.O.No.26 dated 24-3-200 3 and G.O.No.30 dated 28-3-2003, to declare the said G.Os. as unconstitutional and ultra vires of Articles 14, 16 and 309 of the Constitution of India.
2. The petitioners are represented by Mr.K.Chandru, learned Senior Counsel and Mr.S.Nanda Kumar, while the respondents are represented by the learned Additional Advocate General.
3. In G.O.No.71, dated 19-3-2003, the respondent-State has directed that the maximum qualifying service for a Government servant in order to be eligible for full pension after retirement to be enhanced to 33 years from the existing prescription of 30 years and also directed that pension shall be determined based on the average emolument drawn during the last 10 months of service rendered by the government servant at the time of retirement. The said G.O. was made applicable to the Government servants retiring on or after 1-4-2003. It is relevant to state that prior to the issuance of the above said G.O., the pension was determined either based on 50% of the average emoluments drawn during the last 10 months of service rendered or 50% of the pay last drawn by the Government servants which ever was higher.
4. In G.O.No.72 dated 19-3-2003, the respondent-State directed that at the time of retirement, encashment of leave up to a maximum of 30 0 days alone should be allowed as against the maximum of 330 days which was prevailing earlier. Further, it was directed that the encashment of leave salary at the time of retirement should be based on Pay plus Dearness Allowance only and other allowances would not be taken into account. The said G.O. also was to take effect from 1-4-2003.
5. In G.O.No.73 dated 19-3-2003, the respondent-State revised the commutation value payable based on a multiplicity discount rate of commutation of 8% as against the discount rate of 4% which was in existence.
6. In G.O.No.74 dated 19-3-2003, the maximum limit for commutation of portion of pension by the pensioner was restricted to 33.1/3% of pension as against the prevailing quantum of 40%. This G.O. was also to take effect from 1-4-2003.
7. In G.O.No.26, dated 24-3-2003, consequential amendments to the Fundamental Rules pursuant to G.O.No.72 dated 19-3-2003 came to be incorporated, while in G.O.No.30, dated 28-3-2003, necessary amendments in the Fundamental Rules in APPENDIX-I in ANNEXURE-III came to be made pursuant to G.O.No.72 and G.O.No.26 dated 19-3-2003 and 24-3-2003 respectively.
8. While addressing arguments, Mr.K.Chandru, learned Senior counsel appearing for the petitioner in W.P.No.11228 of 2003, contended that full pension on completion of 30 years was provided in G.O.No.461 dated 31-7-1996 considering the fact that the age limit for entry into Government service came to be raised to 28 years and an employee entering the Government service at the age of 28 years would not qualify for full pension after

retirement on completion of 58 years if 33 years was to be fulfilled for earning full pension and therefore, when the age of retirement continue to remain at 58 years, in spite of the recommendation of the Vth Pay Commission to raise the age of retirement to 60 years, the impugned G.O.No.71 dated 19-3-2003 enhancing the completed year of service from 30 to 33 years for earning full pension was uncalled for. According to the learned Senior counsel, when there was no change in circumstances, the increase thus made from 30 to 33 yeas would work hardship to the Government servants, apart from the said enhancement being arbitrary, unreasonable and also in violation of Article 14 of the Constitution. The learned Senior counsel further contended that the financial crunch mentioned in the G.O. cannot be a ground for increasing the qualifying period for earning full pension. According to the learned Senior counsel, the removal of proviso to FR-II under G.O.No.19 dated 5-7-2003 came to be made after the filing of the Writ Petitions and therefore, the said amendment cannot be relied upon for defeating the claims of the petitioners.

9. By referring to G.O.No.73 dated 19-3-2003, the learned Senior counsel contended that when the current market condition is the other way about, the enhancement in the discount rate from 4% to 8% would amount to charging usurious interest on the future pensioners. The learned Senior counsel by referring to the Tamil Nadu Civil Pension (Commutation) Rules 1944 and the Table provided therein, would contend that the discount rate of 8% now made under G.O.No.73 would completely erode the benefit of commutation and will virtually make the commutation benefit an illusory one. The learned Senior counsel would also contended that the present direction of the respondent-State to determine the pension only based on 10 months average pay at the time of retirement and thereby giving a go bye to the previous system of either 10 months average pay or last drawn wage whichever was higher would also create serious monetary loss to the pensioners who retired after 1-4-2003 which again was unreasonable and arbitrary exercise of power by the respondent-State.

10. As regards the challenge to G.O.No.72, wherein the encashment of Earned Leave had been restricted to 300 days as against 330 days apart from calculation for such encashment to be made only on Pay plus Dearness Allowance as against all emoluments, the learned Senior counsel would contend that no justification was shown in the G.O. for restricting it to 300 days, as well as, to basic Pay plus Dearness Allowance alone. As regards the stipulation that only 50% alone would be allowed by way of encashment, while for the remaining 50%, the pensioners would be issued with Small Savings Certificate, the learned Senior counsel contended that such directions were not only arbitrary, were thoroughly unjustified inasmuch as, the Leave Encashment was an incentive for the employees who work without availing their Earned Leave, that if the employees had availed the Earned Leave, they would have earned all allowances apart from Pay plus Dearness Allowance which has now been deprived of by virtue of the present G.O.

11. As regards G.O.No.74, dated 19-3-2003, the learned Senior counsel contended that the restriction of commutation from 40% to 33.1/3% was again arbitrary and violative of Article 14 of the Constitution. The learned Senior counsel relied upon the Judgments reported in 198 3(1) SCC 305 (D.S.NAKARA AND OTHERS versus UNION OF INDIA); AIR 1982 SC 1265 (UNION OF INDIA versus CURNAM SINGH); 1985(1) SCC 523 (K. NAGARAJ AND OTHERS, ETC.

ETC., versus STATE OF ANDHRA PRADESH AND ANOTHER, ETC.); 1985 (Suppl.) SCC 432 (B.PRABHAKAR RAO & OTHERS versus STATE OF ANDHRA PRADESH & OTHERS) in support of his submissions. In this context, the learned Senior counsel while referring to one other G.O.No.75 dated 19-3-2003, wherein, the State originally directed the settlement of Gratuity would be 50% cash and 50% Small Savings Certificate, later on came forward with G.O.No.218 dated 26-7-2003 withdrawing the said proposal made under G.O.No.75 and that while so withdrawing, it was merely stated in that G.O., that the Government now decided to pay the entire Gratuity amount in full and thereby disclosing that the reasons which were stated in G.O.No.75 as well as in the other G.Os. were not true and real. The learned Senior counsel also relied upon 1984(3) SCC 518 (KATHEEJA BAI versus SUPERINTENDING ENGINEER & OTHERS); 1993(4) SCC 288 (ALL INDIA JUDGES' ASSOCIATION AND OTHERS versus UNION OF INDIA AND OTHERS, ETC.); 2002(4) SCC 247 (ALL INDIA JUDGES' ASSOCIATION & OTHERS versus UNION OF INDIA & OTHERS) in support of his submissions that financial aspect alone cannot be a ground for meddling with such pensionary benefits payable to Government employees. The learned Senior counsel relied upon 1989(1) SCC 765 (HINDUSTAN PETROLEUM CORPORATION LTD. Versus H.L.TREHAN & OTHERS) to contend that when such valuable rights are to be interfered with, by issuance of such impugned G.Os. , the petitioner should have been heard.

12. Mr.Nanda Kumar, learned counsel appearing for the petitioners in W.P.Nos.18903 of 2003, etc., by referring to the Budget Estimate for 2002-2003, contended that the pension liability was only of the order of 15.90% and therefore, there was no justification for the respondent-State to meddle with the existing benefits by issuance of the impugned G.Os. on the ground of financial crunch. The learned counsel relied upon 1984(3) SCC 369 (SUDHIR CHANDRA SARKAR versus TATA IRON AND STEEL CO.LTD. & OTHERS); 1993(4) SCC 62 (STATE OF WEST BENGAL AND OTHERS versus RATAN BEHARI DEY AND OTHERS); and 1990(4) SCC 207 (KRISHENA KUMAR versus UNION OF INDIA AND OTHERS, ETC.,) in support of his submission.

13. As against the above submissions, the learned Addl.Advocate General prefaced his submissions by submitting that the government servants hold a status and are governed by Rules which are all conditions of service and that those conditions can be altered unilaterally by the Government which position has also been approved by the Hon'ble Supreme Court in the judgments reported in 1975 SC 1646 (N.LAKSHMANA RAO AND OTHERS ETC. versus STATE OF KARNATAKA AND OTHERS) and 1993(4) SCC 62 (STATE OF WEST BENGAL AND OTHERS versus RATAN BEHARI DEY AND OTHERS). The learned Addl.Advocate General, by referring to the Judgment of the Hon'ble Supreme Court reported in AIR 1981 SC 561 (B.S. YADAV AND OTHERS; PRITPAL SINGH AND OTHERS versus STATE OF HARYANA AND OTHERS; STATE OF PUNJAB AND OTHERS), contended that the scope and content on the power under Article 309 is legislative in character, therefore, the question of violation of principles of natural justice are not attracted unlike the case of exercise of an Executive power. The learned Addl.Advocate General would contend that even the test of the impugned G.Os. Under Article 14 are limited in scope, namely, as to whether it is so very arbitrary or irrational in order to be interfered with. By drawing comparison to the ratio set out in the Judgment of the Hon'ble Supreme Court rendered in AIR 1985 SCC 551 (K.NAGARAJ & OTHERS ETC., ETC., versus ANDHRA PRADESH & ANOTHER, ETC.,), the learned Addl.Advocate

General would contend that the legislative power cannot be struck down on the ground of non-application of mind. In the next place, the learned Addl.Advocate General contended that the right accrued in the case of a Government employee on the occurrence of retirement though it is a condition of service, it is highly doubtful whether it is competent for the petitioners to question the impugned G.Os. He placed reliance upon 1997(6) SCC 623 (CHAIRMAN, RAILWAY BOARD AND OTHERS versus C.R.RANGADHAMAIAH AND OTHERS) in support of his submissions. By referring to the Expenditure Statement of Salaries and Pension, the learned Addl.Advocate General contended that the pension needs substantial revenue of the State and therefore, the reasoning of the State Government that the pension payment can no longer be financially sustained at the same level of entitlement cannot be found fault with. The learned Addl.Advocate General also made a comparative statement of the maximum qualifying service that had been provided for to earn full pension right from the period October 1970 up to the issuance of the impugned notifications, and contended that the period of 30 years was prevailing even when the age of retirement was 55 years, that when the age of retirement for government servant was raised to 58 years in the year 1979, the maximum qualifying service was also raised to 33 years and that only for a short period, it was brought back to 30 years in the year 1996 which has now been restored to 33 years under the impugned G.Os.

14. As regards the basis of the calculation which has now been made as 10 months average emoluments as against the practice of either last drawn pay or 10 months average whichever was higher as per G.O.Ms.No.461, dated 31-7-1996, the learned Addl.Advocate General contended that when that was the consistent practice followed in the earlier years, the restoration of the same by the impugned notifications cannot be interfered with. The learned Addl.Advocate General also contended that there cannot be an argument based on legitimate expectation as has been held by the Hon'ble Supreme Court in the judgment reported in 1994(5) SCC 509 (MADRAS CITY WINE MERCHANTS' ASSOCIATION AND ANOTHER versus STATE OF T.N. AND ANOTHER).

15. As regards the contentions raised on behalf of the petitioners on G.O.Ms.No.72, the leaned Addl.Advocate General, would contend that in the light of the rational behind the reduction introduced as regards the maximum encashment of Earned Leave which was reduced from 330 days to 300 days which is calculated based on Pay plus Dearness Allowance, the same was perfectly justified.

16. The learned Addl.Advocate General by referring to the justification pleaded in paragraph 8 and 9 of the counter affidavit, contended that when in other States, the maximum number of Earned Leave for encashment was either 300 days or less than that, it cannot be held that the action of the State Government in bringing it on par with the other States was irrational. The learned Addl.Advocate General also contended that the Leave Encashment cannot be equated to Pay and Pension in order to claim that the employees' fundamental rights got affected. It was also submitted that when the pensioners are issued with the National Savings Certificates in the form of bonds and when they can borrow in case of emergency by utilizing those bonds, it cannot be held that the pensioners are totally deprived of the said benefit in so far as that part of the payment was concerned.

17. As regards the contention of the petitioners on G.O.Ms.No.74, the learned Addl.Advocate General would contend that even when

it was sought to be enhanced under G.O.Ms.No.174, dated 21-4-1998 to 40%, the rule then prevailing provided for only 33.1/3%, that the rule was not subsequently amended enhancing the rate up to 40% and therefore, even though the higher quantum of commutation was subsequently allowed since the rule as on date continue to remain only at 33 1/3%, the present G.O. bringing it in consonance with the said rule at the rate of 33 1/3% does not call for interference.

18. As regards G.O.Ms.No.73, the learned Addl.Advocate General would contend that the enhancement of discount rate from 4% to 8% is also neither irrational nor arbitrary inasmuch as, the 4% was fixed in the year 1963 when the Pension Rules came into being and when it is compared with the present rate of interest charged for House Building Advances, as per the statement filed before this Court it can be visualized that the enhancement now sought to be made was quite reasonable.

19. On the submissions made on behalf of the petitioners that financial constraint cannot be a relevant factor, the learned Addl. Advocate General relied upon 1997(2) SCC 342 (STATE OF RAJASTHAN AND ANOTHER versus AMRIT LAL GANDHI AND OTHERS), 2000(3) SCC 733 (STATE OF PUNJAB AND OTHERS versus BOOTA SINGH AND ANOTHER) and 1997(6) SCC 623 (CHAIRMAN, RAILWAY BOARD AND OTHERS versus C.R.RANGADHAMAIAH AND OTHERS) in support of his submissions.

20. As regards the reliance placed on behalf of the petitioners on the judgment reported in 1993(4) SCC 288 (ALL INDIA JUDGES' ASSOCIATION AND OTHERS versus UNION OF INDIA AND OTHERS, ETC.), the learned Addl.Advocate General contended that even in that very judgment, the Hon'ble Supreme Court has specifically stated that Judiciary cannot be equated to the other employees of the State Government and it was on that footing it was held therein that financial capacity cannot be a ground when the Court wanted the State Govern ment to provide minimum service conditions. The learned Addl.Advocate General also contended that in any case, such argument cannot be applied to the Leave Encashment though it may have some relevance to the pension payment. As regards the submission made on violation of principles of natural justice, the learned Addl.Advocate General contended that the same can have no application to a statutory rule.

21. Having heard the learned counsel and in order to appreciate the challenge made in these Writ Petitions, we feel it appropriate to make reference in the forefront to the principles set out in the various judgments relied upon by the learned counsel for the parties.

22. In AIR 1984(3) SCC 518 (KATHEEJA BAI versus SUPERINTENDING ENGINEER & OTHERS), when financial constraint was put forth as a submission in respect of a terminal benefit called special contribution payable to an employee of Electricity Board under the Contributory Provident Fund Regulations, while dealing with the said contention, it was held as under in para 8.

"8.There was then the usual lament that a large number of employees were involved and, therefore, the cost will be heavy. We do not understand this argument at all. Does it mean that beneficent legislations and beneficent schemes must be confined to small establishments employing a few workers only? On the other hand, it is misleading to say that the cost is heavy. The cost is made to appear heavy divorced from the size of the establishment. If the establishment is huge and if a large number of workmen

are employed the total wage-bill may appear to be heavy, but is it really so? Is it disproportionate to the size of the establishment, its resources, its revenues and its other expenditure? Is the individual wage-bill also very high? To talk of heavy cost without reference to other circumstances is to present an entirely unfaithful picture. We need make no further comment. (Emphasis added)

23. In 1983(1) SCC 305 (D.S.NAKARA AND OTHERS versus UNION OF INDIA), the Hon'ble Supreme Court, while examining the goals that pension scheme seeks to subserve, held that it must provide the pensioner who would be able to live: (i) free from want, with decency, independence and self-respect and (ii) at a standard equivalent at the preretirement level. The Hon'ble Supreme Court summed up by saying that pension is not only compensation for loyal service rendered in the past, but pension also has a broader significance, in that it is a measure of socio-economic justice which inheres economic security in the fall of life when physical and mental prowess is ebbing corresponding to aging process and, therefore, one is required to fall back on savings and one such saving in kind to a person who gave his best in the hey-day of life to his employer, in days of invalidity, economic security by way of periodical payment is assured. It was held that the pension payable to a Government Servant is earned by rendering long and efficient service and therefore can be said to be deferred portion of the compensation or for service rendered. In that case, the controversy related to the issue as to the calculation of pension which was made on the basis of the average of emoluments of 36 months of service which was brought down to an average of 10 months service with a cut of date fixed as 1-4-1979 i.e. the dates subsequent to which, the liberalized pension formula was extended to the Government servants who retired after that date. Consequently, the pensioners who retired prior to the specified date had to earn pension on the average emoluments on 36 months salary just preceding the retirement. In that context, the Hon'ble Supreme Court has held as under in para 42.
"42. ... If the State considered it necessary to liberalise the pension scheme, we find no rational principle behind it for granting these benefits only to those who retired subsequent to that date simultaneously denying the same to those who retired prior to that date. If the liberalisation was considered necessary for augmenting social security in old age to government servants then those who , retired earlier cannot be worst off than those who retire later. Therefore, this division which classified pensioners into two classes is not based on any rational principle and if the rational principle is the one of dividing pensioners with a view to giving something more to persons otherwise equally placed, it would be discriminatory. To illustrate, take two persons, one retired just a day prior and another a day just succeeding the specified date. Both were in the same pay bracket, the average emolument was the same and both had put in equal number of years of service. How does a fortuitous circumstance of retiring a day earlier or a day later will permit totally unequal treatment in the matter of pension? One retiring a day earlier will have to be subject to ceiling of Rs 8100 p.a. and average emolument to be worked out on 36 months' salary while the other will have a ceiling of Rs 12,000 p.a. and average emolument will be computed on the basis of last 10 months' average. The artificial division stares into face and is unrelated to any principle and whatever

principle, if there be any, has absolutely no nexus to the objects sought to be achieved by liberalising the pension scheme. In fact this arbitrary division has not only no nexus to the liberalised pension scheme but it is counter-productive and runs counter to the whole gamut of pension scheme. The equal treatment guaranteed in Article 14 is wholly violated inasmuch as the pension rules being statutory in character, since the specified date, the rules accord differential and discriminatory treatment to equals in the matter of commutation of pension. A 48 hours' difference in matter of retirement would have a traumatic effect. Division is thus both arbitrary and unprincipled. Therefore, the classification does not stand the test of Article 14."
(Underlining is ours)

24. In AIR 1982 SC 1265 (UNION OF INDIA versus CURNAM SINGH), while dealing with the entitlement of encashment of Earned Leave of a Judge of the High Court, the Hon'ble Supreme Court has held as under in para 7.
"7. ....We may observe that even as a right to receive pension, although accruing on retirement, is a condition of service, so also the right to the payment of the cash equivalent of leave salary for the period of unutilised leave accruing on the date of retirement must be considered as a condition of service.
(Underlining is Ours)
In the above said Judgment, the Hon'ble Supreme Court has laid the parameters as to under what circumstances, a policy decision of a State can be interdicted by the Courts in paras 7 and 8.
25. While dealing with the issue relating to reduction of age of retirement from 58 to 55, in the Judgment reported in AIR 1985 SC 551 (K.NAGARAJ & OTHERS ETC., ETC., versus ANDHRA PRADESH & ANOTHER, ETC.,) the Hon'ble Supreme Court took into account the variation in the retirement age which existed in the various States in India, and ultimately, the Hon'ble Supreme Court held based on the Reports of the various Commissions that the gradation of new avenues of employment for the youth being integral part of the policy governing the fixation of retirement age, the reduction in the age of the retirement from 58 to 55 cannot be held to be arbitrary or irrational. In para 37, the Hon'ble Supreme Court made it clear that the amendment to the Fundamental Rules, whereby, the proviso to Rule 2 was deleted, is well within the powers of the rule-making authority or the Legislature. It was further held in that context that service rules can be as much amended, as they can be made under the proviso to Article 309 and that the power to amend those rules carried with it the power to amend them retrospectively.
26. In 1985 (Suppl.) SCC 432 (B.PRABHAKAR RAO & OTHERS versus STATE OF ANDHRA PRADESH & OTHERS), dealing with the case relating to the age reduction in the matter of retirement of a Government Servant of Andhra Pradesh, covered by the decision in 1985(1) SCC 523 (K.NAGARAJ AND OTHERS, ETC. ETC., versus STATE OF ANDHRA PRADESH AND ANOTHER, ETC.), the Hon'ble Supreme Court as a general preposition of law has stated as under in para 9.
"9. ... One wonders how a decision concerning the lives and the future of civil servants, who all their lives in the past, had loyally served the Government, could have been taken in such a hasty and haphazard fashion. One would expect such a decision to be taken after a full investigation into the multitudinous pros and cons, after collection of all

pertinent data and after deep consideration of every aspect of the question.
... "

27. In 1993(4) SCC 288 (ALL INDIA JUDGES' ASSOCIATION AND OTHERS versus UNION OF INDIA AND OTHERS, ETC.) while considering the review petitions filed by the Union of India and Other states, one of the conditions related to the very heavy financial outlay with varying degrees of resources of the State Governments in implementing the directions of the Hon'ble Supreme Court and thereby stating that it was not possible to bring about uniformity in service conditions as envisaged in the directions given by this Court. In that context, it was held by the Hon'ble Supreme Court in para 16 that when the duties are obligatory, no grievance can be heard that they cast financial burden. It was further held therein that the directions prescribed the minimum service conditions and facilities for the proper administration of justice and therefore, such contentions were ill-suited to the issues involved in that case. It was further held in para 19 as settled proposition of law that the minimum service condition will have to be ensured irrespective of the capacity to fund them.

28. In 1989(1) SCC 764 (HINDUSTAN PETROLEUM CORPORATION LTD. versus H.L.TREHAN AND OTHERS, ETC.), it was held in para 11, that there can be no deprivation or curtailment of any existing right, advantage or benefit enjoyed by a Government Servant without complying with the rules of natural justice by giving the government servant concerned an opportunity of being heard and that any arbitrary or whimsical exercise of power prejudicially affecting the existing conditions of service of a government servant will offend against the provision of Article 14 of the Constitution.

29. In 1984(3) SCC 369 (SUDHIR CHANDRA SARKAR versus TATA IRON AND STEEL CO.LTD. & OTHERS) though dealt with the right of an industrial workman to claim his terminal benefits, namely, gratuity, the proposition of law has been stated as under in para 20.

"20. Viewed from a slightly different angle, our Constitution envisages a society governed by rule of law. Absolute discretion uncontrolled by guidelines which may permit denial of equality before law is the anti-thesis of rule of law. Absolute discretion not judicially reviewable inheres the pernicious tendency to be arbitrary and is therefore violative of Article 14. Equality before law and absolute discretion to grant or deny benefit of the law are diametrically opposed to each other and cannot coexist. Therefore, also the conferment of absolute discretion by Rule 10 of the Gratuity Rules to give or deny the benefit of the rules cannot be upheld and must be rejected as unenforceable.
(Emphasis added)

30. In 1993(4) SCC 62 (STATE OF WEST BENGAL AND OTHERS versus RATAN BEHARI DEY AND OTHERS), the Hon'ble Supreme Court distinguished that case from that of 'D.S.Nakara' and held that where employee's retiring prior to particular date and those retiring thereafter were governed by different sets of rules, it cannot be held that the specification of the date was arbitrary in order to apply the principles set out in 'D.S.Nakara's case'.

31. In 1990(4) SCC 207 (KRISHENA KUMAR versus UNION OF INDIA AND OTHERS, ETC.,) by referring to the judgment in 'D.S.Nakara's case', the Hon'ble Supreme Court held that in that case it was never held that both the pension retirees and the PF retirees formed a homogeneous class and that any

further classification among them would be violative of Article 14. It was further held that under the contributory PF scheme, the Government's obligation towards an employee to give the matching contribution begins as soon as his account is opened and ends with his retirement when his rights qua the government in respect of Provident Fund is finally crystallized and thereafter no statutory obligation continues. On the other hand, under the Pension Scheme, the government's obligation does not begin until the employee retires when only it begins and it continues till the death of the employee. Thus, on the retirement of an employee government's legal obligation under the Provident Fund account ends while under the Pension Scheme it beings.

32. In 1975 SC 1646 (N.LAKSHMANA RAO & OTHERS ETC. versus STATE OF KARNATAKA & OTHERS, ETC.), the Hon'ble Supreme Court has held that the legal position of a Government servant is one of status than of contract, that the duties of status are fixed by law and that the terms of service are governed by statute or statutory rules, which may be unilaterally altered by the Government without consent of the employee.

33. In AIR 1981 SC 561 (B.S.YADAV AND OTHERS; PRITPAL SINGH AND OTHERS versus STATE OF HARYANA AND OTHERS; STATE OF PUNJAB AND OTHERS), it has been held that the power exercised by the Governor under the Proviso to Article 309 is a power which partakes the characteristics of the Legislative and not executive power.

34. In AIR 1986 SC 515 (INDIAN EXPRESS NEWSPAPERS (BOMBAY) PRIVATE LTD. AND OTHERS ETC., ETC. versus UNION OF INDIA & OTHERS), the Hon'ble Supreme Court has held as under in para 76.

"76. .... On the facts and circumstances of a case, a subordinate legislation may be struck down a. arbitrary or contrary to statute if it fails to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution. This can only be done on the ground that it does not conform to the statutory or constitutional requirements or that it offends Article 14 or Article 19(1)(a) of the Constitution. It cannot, no doubt, be done merely on the ground that it is not reasonable or that it has not taken into account relevant circumstances which the Court considers relevant."

(Underlining is Ours)

35. In 1997 (6) SCC 623 (CHAIRMAN, RAILWAY BOARD AND OTHERS versus C.R.RANGADHAMAIAH AND OTHERS), a Constitutional Bench of the Hon'ble Supreme Court was pleased to hold that right to property guaranteed under Article 31 (1) of the Constitution were not available with effect from 20-6-1979 by virtue of the Constitution (44th Amendment) Act, 1978 under which the said provisions in the Constitution stood omitted.

36. In 1994(5) SCC 509 (MADRAS CITY WINE MERCHANTS' ASSOCIATION AND ANOTHER versus STATE OF T.N. AND ANOTHER, ETC., ETC.,) the principle of legitimate expectation was discussed at length by referring to the English as well as Indian decisions and the principles have been ultimately set out in para 48.

"From the above, it is clear that legitimate expectation may arise -

a) if there is an express promise given by a public authority; or

b) because of the existence of a regular practice which the claimant can reasonably expect to continue;
c) such an expectation must be reasonable. However, if there is a change in policy or in public interest the position is altered by a rule or legislation, no question of legitimate expectation would arise."
(Underlining is Ours)

37. In that very Judgment, a passage from the earlier judgment of the Hon'ble Supreme Court reported in 1993(1) SCC 71 (FOOD CORPN. OF INDIA versus KAMDHENU CATTLE FEED INDUSTRTIES) has been extracted which is more relevant for our purpose and the same needs extraction, which reads as under:-
"47. In Food Corpn. of India v. Kamdhenu Cattle Feed Industries44 this Court observed thus: (SCC p. 76, para 8)
"The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of nonarbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this matter would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."

38. By virtue of the judgment of the Hon'ble Supreme Court reported in 1987(1) SCC 142 ("COMMON CAUSE", A REGISTERED SOCIETY AND OTHERS versus UNION OF INDIA), the right of commuting pensioners for restoration of their full pension after completion of 15 years after commutation came to be ordered.
39. In AIR 1968 SC 1053 (STATE OF MADYA PRADESH versus RANOJIRAO SHINDE AND ANOTHER), the Constitutional Bench of the Hon'ble Supreme Court has held that any legislation which empowers the State to appropriate someone else's property for itself solely with a view to augment the resources of the State Government cannot be construed as a reasonable restriction in the interest of the general public. It was held therein that if Article 19(5) is interpreted to mean that the State can take by authority of law anyone's property for the purpose of increasing its estates or revenues guarantee given by the Article 19(1)(f) would become illusory.
40. In 1989(4) SCC 187 (SUPREME COURT EMPLOYEES' WELFARE ASSOCIATION versus UNION OF INDIA AND ANOTHER) ETC.), it has been held in para 59 that the validity of the Subordinate legislation of the Constitution can be challenged on such ground as any other legislative Acts can be challenged and therefore if such rules framed by the Chief Justice of India and approved by the President of India relating to the salary allowances or pensions will

offend against Article 14 and 16 and the same by be struck down by the Court.
41. From a conspectus reading of the various Judgments of the Hon' ble Supreme Court, the following principles emerge:
i) The position of a Government Servant is one of status and the same can be altered by the Government at times of need;
ii) By virtue of the Proviso to Article 309 of the Constitution, the exercise of the Governor by amending the Rules when the service conditions are altered, the same would partake the character of a Legislation;
iii) Though such exercise of powers at the instance of the State Government by resorting to the Proviso to Article 309 is not normally questionable, yet if it is highly arbitrary and irrational, the Courts can still interfere with such actions;
iv) A challenge at the instance of the employees of the State Government in respect of such alterations in the service conditions when made on the ground of legitimate expectation, the scope of interference is highly remote;

v) When financial unsustainability is the basis for making such changes in the existing service conditions, it will have to be decided in the light of the magnitude of the establishment where the wage cost will be high also depending upon its resources, its revenues and other expenses. Further, when the duties are obligatory, no grievances can be heard that they cause financial burden;
vi) The object of the Pension Scheme is that it seeks to subserve the pensioner who should be able to live: (i) free from want, with decency, independence and self-respect and (ii) at a standard equivalent at the pre-retirement level.
vii) The grounds of attack of arbitrariness on the fixing of a cut of date will have to be decided in the anvil of whether the employees who retired prior to that date and after the date were governed by the same or different sets of rules;

42. Keeping the above said principles in mind, when the submissions of the respective counsel are analysed, the Senior counsel appearing for the petitioners would contend that the various alterations now introduced under the impugned G.Os. are arbitrary, irrational and also hit by the principles of legitimate expectation apart from prescription of the cut of date creating a discrimination as between retirees prior to 1-4-2003 and after 1-4-2003. It was also submitted that when the very same financial unsustainability led to the issuance of G. O.Ms.No.75 dated 19-3-2003 which came to be annulled without any subsequent change in the circumstances in G.O.Ms.No.218 dated 27-6-2003; on the same parity of reasoning, the impugned G.Os. the basis of which being the same, viz., financial unsustainability, they are also liable to be set aside for the various reasons urged on behalf of the petitioners.
43. According to the learned Addl.Advocate General, when the scope of interference with such Notifications which are legislative in character being limited to the extent of arbitrariness or irrationality and when it was sufficiently demonstrated as to how the Pay revision after 1-1-1996 created a heavy burden on the State's exchequer; by virtue of disbursement of salaries and terminal benefits soaring to very high levels, the changes brought out under the impugned G.Os. cannot be interfered with.
44. At the outset, we wish to deal with G.O.No.74 dated

19-3-2003 inasmuch as, the same does not call for interference for the reason that the rule relating to the maximum extent of commutation available as it existed even prior to the issuance of the said G.O. Was only 33.1/3%. Even though earlier by G.O.Ms.No.174 dated 21-4-1998, the commutation was permitted up to 40% and made applicable to employees retiring from service on or after 1-4-1998, significantly that G.O. did not contemplate any consequent amendment to the Rules for enhancing the prevailing level of commutation which was 33.1/3% at that point of time to the level of 40%. Therefore, the indisputable position as on date is that the rule contemplates only commutation up to a level of 33.1/3% and not beyond. Though it is not in controversy that after 1-4-1998, the retirees were permitted to have commutation of their pension up to 40%, the same was not supported by the rule. However, we are not concerned with any such commutation permitted so far. Therefore, we are of the view that the present G.O.No.74 dated 19-3-2003 by which the maximum limit of commutation of pension up to 33.1/3% has only brought the level of commutation on par with the rule as it existed as before and as on date. We only wish to state that in the absence of the relevant rules having been amended inconsonance with the raising of the commutation level from 33.1/3% to 40% under G.O.Ms.No.174 dated 21-4-1998 virtually the said raising of the level permitted under that G.O. cannot be held to come into effect at all. That being the prevailing condition of service as regards the permissible level of commutation by virtue of the rule providing only for 33.1/3%, the issuance of G.O.No.74 dated 19-3-2003 in nullifying the effect of G.O.Ms.No.174 dated 21-4-1998 will have to be held to be perfectly justified, and the same is accordingly upheld.

45. As regards G.O.No.71 dated 19-3-2003, under the said G.O., the State Government seeks to alter the maximum qualifying service for earning full pension from 30 years to 33 years. The other alteration under the said G.O. is that the pension to be determined based on 10 months average emoluments only and thereby the other alterernative of determining the same based on last drawn salary came to be deleted. The said altered position was made applicable to the retirees on or after 1.4.2003. As in the other G.Os. namely, 72 and 73, in this G.O. also it is stated that the payment of pension and other retirement benefits in Tamil Nadu reached a level far higher than in any other State in India and therefore a situation has emerged where the continuance of pensionary benefits of all pensioners has become fiscally unsustainable. It was further stated that pension payments can no longer be financially sustained at the same level of entitlements. The said G.O. states that it became a compelling necessity to examine all entitlements with a view to control pension costs in the future. Therefore, the sole reasoning for the introduction of the G.O.was fiscal unsustainability.

46. Similarly in G.O.Ms.No.72 dated 19-3-2003 for the very same reasoning, the maximum encashment of leave at the time of retirement was reduced from 330 days to 300 days and that calculation of such encashment was also restricted to Pay plus Dearness Allowance only, while it was held that other allowances would not be taken into account for that purpose. Again in G.O.No.73 dated 19-3-2003, the discount rate for commutation was enhanced from 4% to 8%. In this G.O., it was additionally stated that the same came to be made in order to align the commutation table with current market conditions.

47. When financial unsustainability was the basis for introducing the above said impugned G.Os. to support the said stand, it was

contended on behalf of the respondent-State that the expenditure of salaries and pension and their percentage with reference to State Owned Tax revenue/Total Revenue Receipts vis-a-vis Total Revenue Expenditure, it disclosed that as of the year 2002-2003 when compared to the year 1 985-1986, it had gone manifold in volume and that if it is allowed to continue at that rate, it will have far reaching effect on the fiscal policy of the state. It was also contended that when a comparative study with reference to other States are made, some of which are much larger than the State of Tamil Nadu, the expenditure incurred on pension and related benefits are far higher in this State than the other states. It was also contended that the total expenditure on pension and other retirement benefits as per the Revised Estimate of 2002-2 003 is of the order of Rs.3,488.20 Crores and the Budget Estimate of 2003-2004 is of the order of Rs.4211.59 Crores which would cover 16.8 6% and 18.58% respectively of the Total Revenue Receipts. Further a comparison was also made as to the pensionary benefits of a particular category of an employee who retired on 31-12-1995 and another employee of the same category who retired on 31-1-1996 which showed higher level of difference in the settlement of terminal benefits which made the existing scheme unsustainable. It was contended that the Government is facing a huge revenue deficit of Rs.3933.47 Crores in Budget Estimate of 2003-2004 and when borrowings are used to meet the current expenditure including pension, it became fiscally unsustainable. Consequently, it was contended that it required the State Government to ensure that the revenue deficit is bridged and controlled. It was stated that in such a situation, controls on all items of expenditure such as salary and other allowances, subsidy, grants in aid have already been introduced. Further it was contended that only as a last resort with no other means available, some control on pension expenditure came to be introduced.

48. When the above said contentions of the respective parties are given a serious consideration in the light of the principles set out by the Hon'ble Supreme Court, we venture to find out whether the changes introduced under the impugned G.Os. in relation to pension and other terminal benefits could be characterised either as arbitrary or irrational so as to interfere with the same.

49. As far as the change which seeks to enhance the maximum of number of years of service from 30 to 33 years in order to earn full pension as introduced in G.O.No.71 dated 19-3-2003, we find from the comparative statement filed before us on behalf of the State Government covering the period prior to 2.10.1970 up to the introduction of the present G.O.; for the period prior to 2.10-1970, the maximum qualifying service for full pension remained at 30 years which came to be reduced to 25 years from 2-10-1970 which position prevailed till 1.1.197 3 when it was again raised to 30 years and continued up to 1.10.1979 when the period came to be raised to the level of 33 years. One other relevant factor to be noted is as between 2.10.1970 and 1979, the age of retirement was stated to be 55 years, when in the year 1979 the age of retirement came to be raised to 58 years, it appears that the maximum qualifying service was also enhanced to 33 years. That position remained till 1-7-1996 when by G.O.No.461 dated 31-7-1996, it came to be reduced to 30 years which has now been raised again to 33 years. As far as the age of retirement after 1-10-1979, it is common ground that it continue to

remain as 58 years under the impugned G.O. That apart, in the counter affidavit filed on behalf of the respondent-State in W.P.No.11667 of 2003, it is stated that it was only with a view to restore the position that prevailed prior to 30-6-1996 and also on the similar line with the service of the Central Government, this came to be made.

50. While attacking the action of the enhancement of the maximum qualifying service to 33 years, it was contended on behalf of the petitioners that when the age of retirement continue to remain at 58 years though it was recommended by the Vth Pay Commission that the retirement age should be increased to 60 years and when the age for entry into service having been raised to 28 years, a person who enters the service of the State Government at the age of 28 years, even after serving the full period will not be able to achieve the maximum qualifying service of 33 years while retiring at the age of 58 years and therefore by making such enhancement up to 33 years, such employees would be deprived of the very entitlement of full pension. In this context, it would be useful to refer to the Judgment of the Hon'ble Supreme Court in the case of 'Nagaraj' reported in 1985 SC 551 (cited supra) wherein, while deciding the action of the State Government in revising the age of retirement from 58 to 55 in the anvil of its arbitrariness and irrationality, it was held that where there were precedents in our country itself where the retirement age was fixed as 55 or for reducing it from 58 to 55 and either the one or the other of those two stages is regarded generally as acceptable, depending upon the employment policy of the Government of the day. It was also held therein that it was not possible to lay down an inflexible rule that 58 years is a reasonable age for retirement and 55 is not. It was further held that if the policy adopted by the Government was shown to violate recognised norms of employment planning, it would be possible to say that the policy was irrational as that would not bear reasonable nexus with the object which it seeks to achieve. We feel that the fixing of maximum qualifying service for full pension can also be decided applying the above said ratio and in the back ground of the reasoning which weighed with the State Government while enhancing it to 33 years from 30 years.

51. When the prevalence of maximum qualifying service as from the period prior to October 1970 to October 1979 was constantly at 30 years when the age of retirement was 55 years and it was enhanced to 33 years when the age of retirement went up to 58 years as from 1-10-197 9, it can be easily visualized that the maximum qualifying service was enhanced from 30 to 33 years corresponding to the fixation of the age of retirement from 55 to 58 years. We, therefore, find force in the submission of the learned Addl.Advocate General that the reduction of it from 33 years to 30 years for a short while from 1-7-1996 till the issuance of the impugned G.O. is quite understandable because we are not able to accept the arguments made on behalf of the petitioners that the increase in the age up to 28 years for entry into Government service necessitated the reduction of the maximum qualifying service from 33 years to 30 years. When the enhancement of maximum qualifying service from 30 to 33 years corresponding to the increase in the age of retirement from 55 to 58 years synchronize with the policy of the State Government and the said condition was prevailing between 1979 and 1996, the rational of the State Government in seeking to restore the said position cannot be said to be arbitrary or irrational. The State Government's policy to increase the age after 28 years for entry into service itself being a

benevolent measure of the State Government, it cannot be held that by providing such an enhancement for entry into service, it should also be ensured that such a late entrant for whatever reasons it may be, should also be provided the scope for earning the maximum pension at the time of his retirement and that deprivation of such a scope by enhancing the maximum qualifying service from 30 years to 33 years should be construed as arbitrary exercise of power. We therefore, hold that such an enhancement of the maximum qualifying service from 30 years to 33 years apparently came to be made by the respondent-State only with a view to restore its original prevailing policy of enhancing it at a time when the age of retirement came to be increased from 55 years to 58 years on and after 1-10-1979. Further, it is also stated that even in the Central Government Services, the same is the position. Though the said reasoning was brought out in the counter affidavit and elaborated upon by the Addl. Advocate General, while making his submissions and not explicitly stated in the very G.O., a reading of G.O.No.71 dated 19-3-2003 disclose that while taking the decision, they referred to the earlier G.O.No.46 1 dated 31-7-1996 in which alone the maximum qualifying service came to be reduced from 33 years to 30 years. In any event, when the impugned G.O. is undoubtedly came to be made by virtue of the exercise of the powers under the proviso to Article 309 of the Constitution, its legislative character is beyond controversy and therefore the justification of it can be supported by all circumstances which prevailed with the State Government while issuing the said G.O. unlike any other Executive or administrative action. Therefore, we are convinced that when the reasons which weighed with the State Government are considered, the same bear an acceptable rationale and does not suffer from any arbitrariness in order to interfere with the same.

52. As far as the other change which was brought out under the said G.O.No.71 dated 19-3-2003 which provides for determination of the pension based on average emoluments drawn during the last 10months only and thereby removing the other alternate of last drawn wages, here again, the test could be only as to whether action of the State was arbitrary or irrational by introducing such a change. In this context a reference to the Judgment of the Hon'ble Supreme Court reported in 1993(4) SCC 62 (cited supra) can be usefully referred to. That was a case where the amended regulations as from 1st April 1977 provided for an employee who retired on and after that date to exercise his option in the prescribed proforma within a specified time to come under the pension scheme. The amended regulations were published in the year 1982. The persons who retired after the publication were automatically governed by the amended regulations and therefore there was no question of exercising any option in their case. The challenge came to be made by those employees who retired prior to 1st April 1977. The prayer was accepted by the High Court by relying upon the decision of the Hon'ble Supreme Court in 'Nakara's case'. Considering the controversy involved, the Hon'ble Supreme Court held that the writ petitioners who retired prior to 1st April 1977 and had drawn the terminal benefits permissible to them constitute a different class from those who retired after 1st April 1977 who alone were governed by the amended regulations. The Hon'ble Supreme Court took the view that prescribing the cut of date as 1st April 1977 as the date from which the new regulations were to come into force was neither arbitrary nor discriminatory. It was further held that so long as such date is specified in a reasonable manner, i.e. without bringing about any discrimination between similarly situated persons, no

interference was called for by the Court. Therefore, the question whether restricting the determination of pension only based on 10 months average pay by scrapping the alternative of making the determination also based on last drawn wages can be held to be so arbitrary or irrational in the facts and circumstances of the case. Applying the above said ratio of the Hon'ble Supreme Court reported in 1993(4) SCC 62 (cited supra), it can be held that by prescribing the date from when the impugned G.O came into operation namely, 1-4-2003, it cannot be held that that by itself would amount to arbitrary exercise of power merely by relying upon the Judgment of the Hon'ble Supreme Court rendered in 'Nakara's case. We say so because the Hon'ble Supreme Court itself in the subsequent judgments, namely, in 'Krishnakumar' reported in 1990(4) SCC 207 and in 'State of West Bengal & others' reported 1993 (4) SCC 62 have interpreted the Judgment in the case of 'D.S.Nakara' and stated the legal position to the effect that mere prescription of a cut of date need not necessarily be taken for treating all retirees to belong to a homogeneous class. In fact, in the judgm ent reported in 1993(4) SCC 62, while the persons who retired prior to 1-4-1977 were not held to be entitled to exercise the option to come under the pension scheme though the altered scheme came to be published much later in the year 1982, while those who retired after 1-4-1977 were allowed to exercise their option, the Hon'ble Supreme Court was pleased to hold that the prescription of such a cut of date as 1-4-1977 would not amount to discrimination or arbitrary exercise of power. Therefore, the prescription of 1-4-2003 as the date from which the present altered situation came to be introduced under the impugned G.O. by itself without anything more cannot be held to be arbitrary or discriminatory exercise of power. It will have to be borne in mind that in the case of ' D.S.Nakara', the benefit of working out the pension from the prevailing situation of 36 months average was brought down to 10 months average which benefit was made available to future retirees alone, the Hon'ble Supreme Court held that it should be made available to past retirees also. We are dealing with a converse case where, one other mode of calculation which was beneficial came to be removed which was made applicable to persons who retired after 1-4-2003. Therefore, applying the principles set out in the subsequent judgments of the Hon'ble Supreme Court rendered in 1990(4) SCC 207 and 1993(4) SCC 62 (cited supra), wherein, it has been held that 'D.S.Nakara case' on the question of cut off date cannot be applied to all cases, and following the principles set out in those judgments, whereby it can be held that the cut off date 1-4-2003 in the case on hand makes out an indefeasible group after that date, they will have to be held to be treated as a different class altogether and not comparable to those who retired prior to that date. Therefore, we are satisfied that the scrapping of the other alternation of working out the pension based on last drawn wages does not by itself will amount to arbitrary exercise of power so as to interfere with the said G.O. impugned herein.

53. The next question would be whether that may be held to be irrational one in order to be interfered with. Here again, when we go by the practice prevailing right from the period to 2-10-1970 up to the change which came to be introduced as and from 1-7-1996, we find that while in the earlier years, the payment was based on 36 months average emoluments, for a short period between 1970 and 1973, it was based on 12 months average emoluments. Thereafter, as and from 1-1-1973 up to 30-6-1996, it was based on 10 months average emoluments only. In fact, the rate of pension during the period

2-10-1970 to 30-9-1979 was at the rate 30-80/33-80 only while as from 1-7-1996 by virtue of G.O.Ms.No.461 dated 31-7-1996, it was further provided apart from calculating it either based on 10 months average pay, it can also be worked out based on the last pay drawn which ever is higher, which position prevailed only between 1996 and the date of issuance of the present impugned G.O. In such circumstances, the present attempt of the State Government under the impugned G.O. to restore the original position, namely, to restrict it to 10 months average pay alone cannot be held to be irrational in order to be interfered with in these Writ Petitions. Therefore we hold that we are unable to interfere with the said G.O. No.71 dated 19-3-2003 either on the ground of arbitrariness or irrationality.

54. As far as the validity of G.O.No.72 is concerned, that relates to Leave Encashment. The arguments in attacking the validity of the G.O. was common. Therefore, the question for consideration is whether on the ground of financial unsustainability, the accrued rights of the petitioners for encashment of Earned Leave which was prevailing at the level of 330 days can be restricted to 300 days and the calculation made on Pay and Dearness Allowance alone can be held to be arbitrary and discriminatory.

55. According to the petitioners, when the retirees prior to 1-4-20 03 as well as those who retired after 1-4-2003 were similarly placed, the prescription of the cut of date namely, 1-4-2003 had created a discrimination as between two sets of retirees who were similarly placed and therefore the same is hit by Article 14 of the Constitution. It was also contended that both the set of employees got their rights accrued in their favour in so far as the encashment of leave was concerned and therefore, the deprival of the same to those who retired after 1-4-2003 would amount to stark discrimination.

56. Here again, the contention on behalf of the respondents-State was that the reduction in the number of days as well as the basis was necessitated due to alarming financial constraints of the State Government. It was also contended that the leave entitlement in other states is also either 240 days or 300 days and the calculation based on Pay and Dearness Allowance alone and therefore, adoption of such a course by the impugned G.O. would not amount to arbitrary exercise of power. By G.O.No.26 dated 24-3-2003 while bringing necessary amendment to the relevant rules, namely, in Rule 86(a) of sub rule came to be introduced providing for payment of such Leave Encashment, 50% in cash and 50% as Small Savings Certificate after obtaining the option of the Government Servant to chose either Post Office time deposit for three years or the National Savings Certificate (VIII-Issue) for six years without formal sanction on the date. Corresponding amendment to the Tamil Nadu Leave Rules under Rule 7 was also brought out. Similarly by G.O.No.30 dated 28-3-2003, necessary amendment to the Tamil Nadu Leave Rules for Encashment of Earned Leave and to calculate the same only based on Pay and Dearness Allowance came to be introduced. Unlike the consequence of the change brought out under the other G.Os., impugned, G.O.No.72 has got a direct impact on the monetary aspect of terminal benefits payable to retirees after 1-4-2003 coupled with their accrued right. A submission made on behalf of the State that a future retiree after 1-4-2003 cannot be equated to the existing retiree as the occurrence of retirement takes place after 1-4-2003 and therefore there is no scope for comparing one

with the other. We are afraid that on that footing, it is difficult to differentiate between a past retiree and a future retiree so long as the status of the existing pensioner prior to his retirement and the one whose retirement is to commence from 1-4-2003 is going to be one and the same. Unlike the case covered by the Judgment of the Hon'ble Supreme Court reported in 1993(4) SCC 62 and 1990(4) SCC 207, where though the petitioners in those cases enjoyed a common status in their respective services prior to their retirement, the common distinctive feature was that while the one who were accorded the improved benefit under the new scheme introduced were governed by a different kind of retirement benefit, while the petitioners in those case were PF retirees. That cardinal distinction placed them in an entirely different situation uncomparable with the pension retirees. It was in those circumstances, the Hon'ble Supreme Court was pleased to hold that the PF retirees and pension retirees cannot be equated in order to apply the ratio of the Judgment of the Hon'ble Supreme Court in 'D.S.Nakara's case'. In other words where the two group of retirees were governed by different sets of rules in the matter of the terminal benefits, there was no scope to apply the ratio rendered in 'D.S.Nakara's case' in order to hold that the petitioners in those cases were discriminated against as against the earlier group. Such is not the case here. The pensioners who retired prior to 1-4-2003 and those who retired after 1-4-2003 not only enjoyed the status of Government Servant while in service, but fall within the category of pension retirees. Therefore, if the pensioners by virtue of their retirement prior to 1-4-2003 had the benefit of encashment of earned leave accumulated by them to an extent of 330 days based on the Pay and Dearness Allowance plus other allowances earned by them, the question is, could it be held that those who retired after 1-4-2003 should be treated differently and deprived of the very same benefit for the simple reason that their retirement takes place after 1-4-2003. It will have to be mentioned that the Leave Encashment is a benefit which gets accrued by virtue of the Government servant refraining himself from availing the leave benefits that was very much available to him while in service which had he availed, would have enabled him to earn the full salary inclusive of Pay, Dearness Allowance and all other allowances to the full extent of the leave available to him. Therefore, when the Government Servant refrained himself from availing those benefits with the fond hope that he could encash the same at the time of this retirement would get thoroughly disappointed if he were to be told at that point of time that whatever right he had gained is to be forgone for the simple reason that the employer is unable to meet the liability on the ground of financial crunch.

57. In this context, the theory of legitimate expectation coupled with the vices of arbitrariness would get attracted to the situation. Though it could be said that the theory of legitimate expectation can have no application in relation to the policy of the State or its action in the interest of the public at large, we are of the view that when the legitimate expectation had gone to such an extent that the demolition of such an expectation by the action of the State was due to total arbitrariness and also results in a discriminatory treatment to a homogeneous class, certainly the legitimate expectation theory should prevail over the situation in order to remedy the grave injustice caused to the affected group. The stand of the respondentState is solely based on financial unsustainability. We are unable to accept the said stand propounded by the State. The financial

unsustainability was sought to be explained by stating that total percentage of salary and pension liability vis-a-vis either the State Owned Revenue or the Total Revenue Receipts shows alarming escalation and therefore the same calls for a controlling exercise. When such a stand is considered, we find as far as salary liability is concerned, the same was governed by the implementation of Pay Commission recommendations. It will have to be stated that when once the Pay Commission recommendations were decided to be implemented by the State Government, which resulted in the implementation of a higher wage structure at all levels, the State Government cannot be expected to put forth the said circumstance for erosion of its financial stability.

The implementation of the Pay Commission recommendations were necessitated as such recommendations themselves are after consideration of the previous revision of wages when compared to the subsequent raise in cost of living and other relevant factors. Therefore, the State cannot be expected to make a hue and cry once it decided to implement the Pay Commission recommendations which was an inevitable aspect which prevails in every other States and is not a special feature for the State of Tamil Nadu alone. When the day-to-day administration of the State is to be carried out by availing the services of the human personnel, it is bound to meet the cost of the said liability as a matter of course. The Government machinery cannot be expected to function without a human element. Therefore, the increase in the cost while availing such human resources in a developing country in the welfare of the State cannot be held to be factor which is to be suppressed or reduced when improvements and developments in every action of the State takes place in other spheres. In other words, when the sphere of the activity of the State in different areas are to be improved in order to meet the requirement of the public at large, availing of the required number of hands to carry out such functions of the State will have to be necessarily improved and at the prevailing price. Therefore, as held by the Hon'ble Supreme Court in the case of 'Khateeja Bai's case reported in 1984(3) SCC 518 (cited supra), the cost is made to appear heavy, divorced from the size of the establishment and that when the establishment is huge and if a large number of workmen are employed the total wage bill may appear to be heavy, but the question is whether it is really so. It cannot be held to be disproportionate to the size of the establishment, its resources, its revenues and its other expenditure. Therefore, as held by the Hon'ble Supreme Court, to talk of heavy costs without reference to other circumstances is to present an entirely unfaithful picture and therefore such a contention put forth on behalf of the State cannot be countenanced to defeat certain accrued rights of the employees that too at the fag end of their career.

58. In this context, it is relevant to refer to the observations of the Hon'ble Supreme Court in the case 'D.S.Nakara' reported in 1983(1) SCC 305 (cited supra), where the Hon'ble Supreme Court was pleased to hold that the terminal benefits payable to a pensioner is not only compensation for loyal service rendered in the past, but it is a measure of socio-economic justice which inheres economic security in the fall of life when physical and mental prowess is ebbing corresponding to aging process and, therefore, one is required to fall back on savings and one such saving in kind to a person who gave his best in the hey-day of life to his employer. Therefore, such a hard earned benefit while rendering the faithful service to the State cannot be snatched away on the mere ground of financial crunch. The

above said reasons will also hold good for the grounds raised on behalf of the State that comparatively the pension and other terminal benefits are high in the State of Tamil Nadu over other State Governments. Equally, the comparison of the terminal benefits gained by a retiree prior to 3 1-12-1995 and after 1-1-1996 cannot also be considered for the above said reasons. It is also to be noted that the benefit earlier available to the Government employees to encash Earned Leave by working for the period has been suspended by the Government by issuing G.O.Ms. No.211, dated 28-11-2001 and G.O.Ms.No.138, dated 28-11-2002. By the introduction of the present G.O.No.72 dated 19-3-2003, the employees have been deprived of the opportunity of availing the leave and also deprived the benefit of surrender value of suc h accumulated leave. This is not only against the legitimate expectation of the employees, but resulted in depriving the employee the benefit of the accumulated leave which obviously he has accumulated on the representation that at the time of retirement, he would be entitled to encash 330 days of accumulated leave. One can understand if the Government Order would have been made enforceable after a reasonable gap, in which event, any employee having more than 300 days of accumulated leave instead of working, could have availed of the leave. Therefore, the G.O.No.72 dated 19-3-2003 appears to be highly arbitrary and irrational. We are therefore, convinced that the right of the retirees after 1-4-2003 to aspire for the encashment of the leave benefits that existed prior to that date which was made available to the retirees prior to 1-4-20 03 should be made available to them as well and that the deprivation of the same for the reasons mentioned in the G.O.cannot be countenanced. We do not find any acceptable rationale in bringing out such a drastic change in the quantum of leave benefit and the basis of its determination and we therefore, hold that the said G.O. suffers from vices of arbitrariness and also discriminatory hit by Article 14 of the Constitution and accordingly the said G.O. along with consequential G.Os. prescribing the amendments to the existing rules, namely, G.O.Nos.26 dated 24-3-2003 and No.30 dated 28-3-2003 along with G.O.No.72 dated 19-3-2003 are liable to be set aside.

59. As regards G.O.No.73, dated 19-3-2003, the impact of the said G.O. is in enhancing the discount rate of commutation from 4% to 8% with effect from 1-4-2003. Here again, while the first paragraph of the said G.O., is the same as in the other Government Orders, in para 3 of the said G.O., it is stated that in order to align the commutation table with current market condition, the Government proposed to revise the commutation value table based on an implicit discount rate of commutation of 8%. Therefore, the financial unsustainability part, the enhancement in the discount rate was sought to be made based on the current market condition. In that context, the learned Addl. Advocate General brought to our notice the prevailing interest calculation for House Building Advances and attempted to show that after 1963, the discount rate was originally fixed at 4%, in the course of time, when on all other advances charged a higher rate of interest for repayment purposes, the commuted pension cannot be granted at a rate which was fixed at the time when the commutation concept came to be introduced. As against the above said submissions, Mr.K.Chandru, learned Senior counsel appearing for the petitioners would attempt to point out that in the present day condition, even in the Banking sector, interest rate has been considerably reduced even in respect of housing loans, which the Court can take judicial note of and therefore, when the market condition is the other way about, the

respondent-State cannot be expected to seek for an increase in the discount rate and thereby make an enrichment from and out of the benefits payable to a pensioner.

60. We find force in the said submission made on behalf of the petitioners. In the first place, the benefit payable to a pensioner cannot be equated to any other commercial transaction. At the risk of repetition, we wish to refer to the observations of the Hon'ble Supreme Court made in 'D.S.Nakara's case reported in 1983(1) SCC 305, where, the Hon'ble Supreme Court held that the pension payable to a Government servant is an earning made by him by rendering long and efficient service which is stated to be a deferred portion of compensation. By commuting his pension, the pensioner agrees to forgo a portion of his pension. If the pension is drawn on the respective months on a higher rate and when the discount rate was an element to off set the risky factor of unexpected life, namely, the vagories in the life expectancy of the pensioner for the next 15 years, the said rate cannot be attempted to be valued in comparison with the regular commercial transaction in order to enable the State to earn a margin by enhancing the rate of discount. We are convinced that the reduction in the maximum limit of commutation from 40% to 33.1/3% which has now been restored by virtue of G.O.No.74 dated 19-3-2003 would provide sufficient cushion for the State Government to maintain the existing level of discount rate of 4% instead of attempting to double the said rate to 8% and thereby carve out and appropriate to itself a larger portion of commuted pension of retirees on and from 1-4-2003. In this context, one has to remember that the facility for commuted pension was introduced in 1963, and the comparable lending rate that was applicable during those days and in the present days, the sudden introduction of discount rate at 8% (i.e.) virtually doubling the rate also appears to be irrational. One can understand if there would have been a marginal increase but doubling the rate appears to be highly arbitrary and irrational. Further by the drastic increase in the discount rate suddenly doubling it from 4% to 8%, the option of commuted pension, when compared to the rate of interest that prevailed in the market during 196 0s and the present market rate, the option of commuted pension would become illusory. Therefore, for the above said reasons and for the reasons which weighed with us to set aside the G.O.No.72 dated 19-3-200 3, we have no hesitation to hold that the said G.O.No.73 is also arbitrary irrational and without any semblance of foundation, violative of constitutional protection under Article 14 of the Constitution which should not be countenanced in a welfare State. Accordingly, the said G.O.No.73 is also liable to be set aside.

61. Writ Petitions in W.P.Nos.11228, 11666, 11667 and 11668 of 200 3 have been preferred by the Madras High Court Staff Association, represented by its Secretary, challenging G.O.Nos.26 and 30 dated 24-3-2 003 and 28-3-2003 and also G.O.Nos.73, 71 and 74 dated 19-3-2003 respectively. Whereas, the Writ Petitions in W.P.Nos.18903, 18905 and 18 907 of 2003 have been preferred by the Tamil Nadu Secretariat Officers' Association, represented by its Secretary, seeking to call for the records in the Original Applications filed before the State Administrative Tribunal, wherein the said Association challenged the validity of the G.O.Nos.71,74, 73 and 72 dated 19-3-2003 respectively with a consequential prayer to set aside the above said G.Os. Inasmuch as, the Writ Petitions in W.P.Nos.11228, 11229, 11666 to 11668

of 2003 wherein, the challenge to the very same G.Os. was already entertained and pending on the file of this Court, these Writ Petitions were also ordered to be admitted and clubbed along with W.P.Nos.11228, 11229, 1 1666 to 11668 of 2003.

62. Since the issue involved in all these Writ Petitions is common, these Writ Petitions were dealt with in common by this common order. Therefore, we feel it appropriate to pass orders in W.P.Nos.18903, 18905 to 18907 of 2003 though in those Writ Petitions, the petitioners seek for the relief of calling for the records in the respective Original Applications which were already preferred before the State Administrative Tribunal, where again the challenge was only to the G. Os. which have been impugned in the previous set of Writ Petitions, viz., W.P.Nos.11228, 11229, 11666 to 11668 of 2003.

63. In the result, we uphold G.O.Nos.71 and 74 dated 19-3-2003 and set aside G.O.No.72 and 73 dated 19-3-2003, G.O.No.26 dated 24-3-20 03 and G.O.No.30 dated 28-3-2003. Accordingly, the Writ Petitions in W.P.Nos.11228, 18906, 18907 and 11666 of 2003 stands allowed. W.P. Nos. 18903, 18905, 11667 and 11668 of 2003 stands dismissed.

In the circumstances of the case, we make no order as to costs. Consequently, all connected W.P.M.Ps. are closed.

Index: Yes
Internet: Yes

To

1.The Chief Secretary to
Government of Tamil Nadu,
Secretariat,
Chennai-600 009.

2.The Secretary to Government,
Personnel & Administrative Reforms Department,
Chennai-600 009.

3.The Registrar General,
High Court of Madras,
Chennai-600 104.